

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

RICHARD WEBBER,

Plaintiff,

v.

JAMES SLOCUM,

Defendant.

Case No. 3:22-CV-00512-ART-CLB

**REPORT AND RECOMMENDATION OF
U.S. MAGISTRATE JUDGE¹**

Before the Court is Plaintiff Richard Webber's ("Webber"), application to proceed *in forma pauperis* (ECF No. 1), and civil rights complaint, (ECF No. 1-1). For the reasons stated below, the Court recommends that Webber's *in forma pauperis* application, (ECF No. 1), be denied as moot, and his complaint (ECF No. 1-1), be dismissed without prejudice and without leave to amend.

I. IN FORMA PAUPERIS APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

Pursuant to the LSR 1-1: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the

¹ This Report and Recommendation is made to the Honorable Anne R. Traum, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 applicant's income, assets, expenses, and liabilities."

2 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with
3 some particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th
4 Cir. 1981) (quotation marks and citation omitted). A litigant need not "be absolutely
5 destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*,
6 335 U.S. 331, 339 (1948).

7 A review of the application to proceed IFP reveals Webber cannot pay the filing
8 fee, thus the Court recommends that Webber not be assessed the filing fee and the
9 motion be denied as moot. (ECF No. 1.)

10 **II. SCREENING STANDARD**

11 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A
12 provides, in relevant part, that "the court shall dismiss the case at any time if the court
13 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a
14 claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant
15 who is immune from such relief." 28 U.S.C. § 1915A(b). A complaint is frivolous when
16 "it lacks an arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325
17 (1989). This includes claims based on legal conclusions that are untenable (e.g., claims
18 against defendants who are immune from suit or claims of infringement of a legal interest
19 which clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
20 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th
21 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same
22 standard applied in the context of a motion to dismiss under Federal Rule of Civil
23 Procedure 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which
24 requires dismissal where the complaint fails to "state a claim for relief that is plausible on
25 its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

26 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*
27 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must
28 accept as true all well-pled factual allegations, set aside legal conclusions, and verify

1 that the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S.
 2 662, 679 (2009). The complaint need not contain detailed factual allegations, but must
 3 offer more than “a formulaic recitation of the elements of a cause of action” and “raise a
 4 right to relief above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is
 5 taken in reviewing the pleadings of a *pro se* party, for a more forgiving standard applies
 6 to litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).
 7 Still, a liberal construction may not be used to supply an essential element of the claim
 8 not initially pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is
 9 appropriate, a *pro se* plaintiff should be given leave to amend the complaint and notice
 10 of its deficiencies, unless it is clear that those deficiencies cannot be cured. *Cato v.*
 11 *United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

12 **III. SCREENING OF COMPLAINT**

13 In his complaint, Webber sues Defendant Public Defender James Slocum under
 14 42 U.S.C. § 1983. (See ECF No. 1-1.) Webber’s complaint asserts a claim for ineffective
 15 assistance of counsel and “malicious prosecutorial misconduct” and directly relates to his
 16 underlying criminal case and conviction. (*Id.* at 2-4.) Webber requests monetary
 17 damages, a new attorney, and “another chance at [his] preliminary hearing.” (*Id.* at 7.)

18 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority
 19 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d
 20 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir.
 21 2000)). The statute “provides a federal cause of action against any person who, acting
 22 under color of state law, deprives another of his federal rights[.]” *Conn v. Gabbert*, 526
 23 U.S. 286, 290 (1999), and is “merely . . . the procedural device for enforcing substantive
 24 provisions of the Constitution and federal statutes.” *Crumpton v. Gates*, 947 F.2d 1418,
 25 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the violation
 26 of a federally-protected right by (2) a person or official who acts under the color of state
 27 law. *Anderson*, 451 F.3d at 1067.

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1 However, § 1983 is not a backdoor through which a federal court may overturn a
2 state court conviction or award relief related to the fact or duration of a sentence. Section
3 1983 and “the federal habeas corpus statute . . . both provide access to the federal courts
4 ‘for claims of unconstitutional treatment at the hands of state officials, . . . [but] they
5 different in their scope and operation.’” *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir.
6 2003) (quoting *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). Federal courts must take
7 care to prevent prisoners from relying on § 1983 to subvert the differing procedural
8 requirements of *habeas corpus* proceedings under 28 U.S.C. § 2254. *Heck*, 512 U.S. at
9 486-87; *Simpson v. Thomas*, 528 F.3d 685, 695 (9th Cir. 2008). When a prisoner
10 challenges the legality or duration of his custody, raises a constitutional challenge which
11 could entitle him to an earlier release, or seeks damages for purported deficiencies in his
12 state court criminal case, which effected a conviction or lengthier sentence, his sole
13 federal remedy is a writ of *habeas corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997);
14 *Heck*, 512 U.S. at 481; *Wolf v. McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v.*
15 *Rodriguez*, 411 U.S. 475 (1973); *Simpson*, 528 F.3d at 692-93. Stated differently, where
16 “a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction
17 or sentence,” then “the complaint must be dismissed unless the plaintiff can demonstrate
18 that the conviction or sentence has already been invalidated.” *Heck*, 512 U.S. at 487.

19 It appears that Webber is challenging the constitutionality of his state court criminal
20 conviction. Consequently, he must demonstrate that his conviction has been overturned
21 to proceed in an action under § 1983. As he has not done so, his sole relief is a *habeas*
22 *corpus* action.

23 Further, it appears that Webber is asking the court to intervene in ongoing state
24 criminal proceedings. However, the *Younger* abstention doctrine prevents federal courts
25 from interfering with pending state criminal proceedings even if there is an allegation of
26 a constitutional violation, unless there is an extraordinary circumstance that creates a
27 threat of irreparable injury. *Younger v. Harris*, 401 U.S. 37 (1971). The Supreme Court
28 has stated that “federal-court abstention is required” when there is “a parallel, pending

1 state criminal proceeding.” *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013); see
 2 also *Heck v. Humphrey*, 512 U.S. 477, 487 n.8 (1994) (noting that when a state criminal
 3 defendant brings a federal civil rights lawsuit while his criminal charges are pending,
 4 abstention is “an appropriate response to the parallel state-court proceedings”).

5 To determine if *Younger* abstention applies, federal courts look to whether the
 6 state criminal proceeding is “(1) ongoing, (2) implicate[s] important state interests, and
 7 (3) provide[s] an adequate opportunity... to raise constitutional challenges.” *Herrera v.*
 8 *City of Palmdale*, 918 F.3d 1037, 1044 (9th Cir. 2019) (internal quotation marks omitted);
 9 see also *Younger*, 401 U.S. 37. The Ninth Circuit also requires that “[t]he requested relief
 10 must seek to enjoin—or have the practical effect of enjoining—ongoing state
 11 proceedings.” *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 758
 12 (9th Cir. 2014) (citing *AmehsourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir.
 13 2007)). Because it appears Webber’s criminal case is still pending, all prerequisites of
 14 the *Younger* abstention doctrine are present. Webber is the subject of an ongoing
 15 criminal proceeding in state court that has not reached final adjudication. The State of
 16 Nevada has an important interest in protecting the public through the prosecution of
 17 criminal proceedings. Further, the state court criminal proceedings would afford an
 18 opportunity for Webber to raise the constitutional claims asserted in the Complaint.

19 For these reasons, the Court recommends that the complaint be dismissed
 20 without prejudice and without leave to amend.

21 **IV. CONCLUSION**

22 For good cause appearing and for the reasons stated above, the Court
 23 recommends that Webber’s application to proceed *in forma pauperis*, (ECF No. 1), be
 24 denied as moot, and his complaint, (ECF No. 1-1), be dismissed without prejudice and
 25 without leave to amend.

26 The parties are advised:

27 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
 28 Practice, the parties may file specific written objections to this Report and

1 Recommendation within fourteen days of receipt. These objections should be entitled
2 "Objections to Magistrate Judge's Report and Recommendation" and should be
3 accompanied by points and authorities for consideration by the District Court.

4 2. This Report and Recommendation is not an appealable order and any
5 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the
6 District Court's judgment.

7 **V. RECOMMENDATION**

8 **IT IS THEREFORE RECOMMENDED** that Webber's application to proceed *in*
9 *forma pauperis*, (ECF No. 1), be **DENIED AS MOOT**;

10 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint, (ECF No. 1-
11 1); and,

12 **IT IS FURTHER RECOMMENDED** that Webber's complaint, (ECF No. 1-1), be
13 **DISMISSED WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND.**

14 **DATED:** November 29, 2022.

15 
16 **UNITED STATES MAGISTRATE JUDGE**